

January 4, 2006

Civil Division-Kent County (739-7641)

Mr. John R. Weaver, Jr., Esquire
831 North Tatnall Street, Suite 200
Wilmington, DE 19801

Re: **Freedom of Information Act Complaint
Against City of Wilmington Board of License
and Inspection Review**

Dear Mr. Weaver:

On November 8, 2005, our Office received your complaint under the Freedom of Information Act, 29 *Del. C.* Ch.100 ("FOIA"), alleging that the City of Wilmington Board of License and Inspection Review ("the Board") violated the open meeting requirements of FOIA by meeting in private on May 9, 2005 to decide an appeal by your client, 801 Shipley Street, for a one-time waiver of a vacant building registration fee.

By letter dated November 15, 2005, we asked the City of Wilmington to respond to your complaint by November 28, 2005. We granted the City's request for an extension of time and received their initial response to your complaint on December 5, 2005. On December 14, 2005, we asked the City for supplemental information, which we received on December 16, 2005. On December 28, 2005, we asked the City for additional information, which we received on December 29, 2005. On January 3, 2005, we telephoned you for additional information in order to complete

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our investigation.

In the City's initial response to your complaint dated December 5, 2005, the City acknowledged that on May 9, 2005 the Board "did deliberate the merit of cases that were before it in an executive session and out of the purview of the public" for a purpose not authorized by FOIA for private discussion. In mitigation, the City contends "this was done inadvertently and not with malicious intent by the Board. The Board clearly articulated the basis of its decision in its October 18, 2005 letter to the complainant. At worst, it was harmless error for the Board to deliberate in executive session."

In a supplemental response to your complaint dated December 13, 2005, the City argues that your complaint is barred by the statute of limitations under FOIA. According to the City, you were "aware of the alleged improper action as early as May 9, 2005" and therefore you were "required under FOIA to file [your] complaint" within sixty days of that date (prior to July 9, 2005).

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" as authorized by statute for executive session. 29 *Del. C.* §10004(a).

FOIA authorizes a public body to discuss matters of public business privately in executive session for nine specific purposes. *See* 29 *Del. C.* §10004(b)(1)-(9).

FOIA provides that "[a]ny action taken at a meeting in violation of this chapter may be voidable by the Court of Chancery. Any citizen may challenge the validity under this chapter of any action of a public body by filing suit within 60 days of the citizen's learning of such action but in no event later than 6 months after the date of the action." 29 *Del. C.* §10005(a).

LEGAL AUTHORITY

A. Statute of Limitations

Our Office has taken the position that the time limitations "in Section 10005 [of FOIA] do not apply to the Attorney General because the statute of limitations does not run against the sovereign." *Att'y Gen. Op.* 02-IB10 (Apr. 24, 2003). The sixty day/six month statute of limitations in Section 10005(a) applies only to suits a citizen may bring in Chancery Court. It does not apply to complaints under Section 10005(e) brought to the Attorney General's office for administrative review.

Our Office, however, has consistently declined to investigate FOIA complaints of a violation of the open meeting laws where the alleged violation took place more than six months before the complaint was received by our Office. "As a general rule, for fairness and practical reasons, we do not investigate events that occurred more than six months before we received the complaint." *Att'y Gen. Op.* 02-IB10 (Apr. 24, 2002). *Accord Att'y Gen. Op.* 05-IB26 (Aug. 29, 2005); *Att'y Gen. Op.* 94-IO16 (Apr. 7, 1994); *Att'y Gen. Op.* IO28 (Sept. 21, 1993); *Att'y Gen. Op.* 93-IO06 (Mar. 5, 1993).

Your complaint alleges that the Board violated the open meeting law on May 9, 2005 when it met in executive session for a purpose not authorized by law. Our Office received your complaint on November 8, 2005. Because your complaint falls within our six-month rule, we have investigated and will make a written determination under Section 10005(e) of FOIA.

B. May 9, 2005 Executive Session

The City provided us with a copy of the notice and agenda for the May 9, 2005 meeting of

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the Board. The agenda listed fourteen property matters, including "801 Shipley Street" which is the subject of your complaint.

According to your complaint, "[d]irectly following the hearing, my client remained in the council room where the hearings were held to view the deliberations of the Board. The Board refused to permit my client to remain and told the officer of my client to leave. The doors were closed behind him and deliberations occurred in private."

The City provided us with a copy of the Board's case decision in the matter of 801 Shipley Street (a letter dated October 18, 2005). The Board denied your client's request for a one-time waiver of the vacant building registration fees "because the property has been occupied or leased for the entire period stated in the Vacant Property Registration Statement."

The City acknowledges that none of FOIA's nine exceptions for executive session would cover the deliberations of the Board about a waiver of building registration fees. Delaware law does not recognize a "deliberate process" privilege for public bodies like the Board. *See Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, C.A. No. 1216-K, 1994 WL 274295, at p. 12 (Del. Ch., May 19, 1994) (rejecting the board's claim of a "deliberative process privilege for which no support exists in FOIA or in Delaware case law"). The General Assembly has authorized a few public bodies to deliberate in private, but they are the exception under FOIA. *See 29 Del. C. § 10004(h)* (Board of Pardons and Parole, Violent Crimes Compensation Board, Human Relations Commission, Industrial Accident Board, and Tax Appeals Board).

We determine that the Board violated the open meeting requirements of FOIA when it met in executive session on May 9, 2005 to discuss the 801 Shipley fee waiver appeal for a purpose not

authorized by statute.

C. Remediation

In the past, when we have found a violation of the open meeting law, we directed remediation if a public body has taken action on a matter affecting "substantial public rights." *Ianni v. Department of Elections of New Castle County*, 1986 WL 9610, at p. 6 (Del. Ch., Aug. 29, 1986) (Allen, C.). We have previously determined that substantial public rights may be affected by the expenditure of public money,¹ hiring key personnel,² and actions affecting the right to vote.³

In several cases, we have directed remediation where a public body violated the open meeting requirements of FOIA and took official action affecting land use. *See Att'y Gen. Op.* 05-IB15 (June 20, 2005) (approval of a residential subdivision); *Att'y Gen. Op.* 05-IB24 (Aug. 18, 2005) (compliance with zoning requirements); *Att'y Gen. Op.* 02-IB23 (Dec. 23, 2002) (conditional use exception for senior citizen retirement community).

According to the City, the vacant building registration fee assessed by the Board on the 801 Shipley property was \$7,000. According to you, the amount of the fee is \$13,500. Whatever the correct amount, this is a substantial right which would normally require remediation by our Office. You have confirmed, however, that the matter is now pending before the Superior Court in a "city

¹ *See Att'y Gen. Op.* 02-IB12 (May 21, 2002) (increase police officer salaries) and *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2003 (approve a contract change order).

² *See Att'y Gen. Op.* 03-IB06 (rev. Feb. 11, 2003) (hiring of an officer-in-charge of the police department).

³ *See Att'y Gen. Op.* 03-IB17 (July 31, 2003) (forfeiture of city councilman's elected office).

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munition" action and that the Court has temporarily blocked the sheriff's sale of the 801 Shipley property pending review on the merits by the Court.

Under these circumstances, we decline to exercise our discretion to require remediation by the City of the Board's violation of the open meeting requirements of FOIA. The Superior Court could rule in your client's favor on the merits in the munition action, or you could petition the Superior Court in the pending action to invalidate the Board's decision based on an admitted violation of the open meeting law. *See Goicuria v. Industrial Accident Board*, No. 1356-K, 1997 WL 599514, at p. 2 (Del. Ch., Aug. 28, 1997) (Jacobs, V.C.) ("the Superior Court has the power to consider, in addition to any substantive grounds for appeal, procedural claims that the Board violated FOIA").

CONCLUSION

For the foregoing reasons, we determine that the Board violated the open meeting requirements of FOIA by meeting in executive session on May 9, 2005 to discuss the 801 Shipley fee waiver appeal for a purpose not authorized by statute.

Our Office does not direct any remediation for this violation because the matter of the vacant building registration fee is currently before the Superior Court. If the Court decides in your client's favor on the merits, then that will moot any issue of remediation for a FOIA violation. Alternatively, since the Superior Court has already entertained jurisdiction over the merits of the matter, the Court also has jurisdiction to decide any procedural claim that the Board violated the open meeting requirements of FOIA.

The City has advised that since December 19, 2005, the Board has begun to conduct its deliberations in public, so we trust that this issue will not arise in the future.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Keith R. Brady, Esquire
Assistant State Solicitor

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cc: The Honorable Carl C. Danberg
Attorney General

Malcolm S. Cobin, Esquire
Chief Deputy Attorney General

Lawrence W. Lewis, Esquire
State Solicitor

Brenda James-Roberts, Esquire
First Assistant City Solicitor

Phillip G. Johnson
Opinion Coordinator